IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 404 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Applicant(s)

Versus

NURMOHMMAD ISSA SANGHAR & 8 - Respondent(s)

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Appearance :

Mr. LR Pujari, Addl. PUBLIC PROSECUTOR for Petitioner No(s).: 1.

RULE SERVED BY DS for Respondent No(s).: 1, 2, 3, 4, 6, 7, 8,9.

MS GARIMA A SONDHI for Respondent No(s).: 5.

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CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date : 21/07/2005

ORAL JUDGMENT

1. The State has preferred present Cri. Rev. Application under section 397 read with section 401 of CrPC challenging the order dated 03.06.2005 passed by

ld. Addl. Sessions Judge, Kutch at Bhuj in Sessions Case No. 56/2002 whereby the ld. Addl. Sessions Judge rejected the application exh.126 preferred by the ld. Special Prosecutor appearing for the state in the aforesaid Sessions Case.

2. The respondents are the original accused of the Sessions case No.56/2002 arising out of CR. No. i.17/1999 registered at Narayan Sarovar Police Station and they are facing charge for the offences punishable under sections 120-B, 121, 123, 124-A of Indian Penal Code, under section 25(1)(b) and 25(1)((A)(A)) of the Indian Arms Act, under section 13(2) and 14 of the Foreigners Act and under sections 3 & 6 of the Indian Passport (Entry into India) Rules, 1950.

3. When the trial was in progress and some witnesses; say one or two were to be examined by the prosecution, ld. Spl. Prosecutor submitted an application under section 126 of praying that muddamal article No.10 of Sessions Case No.85/1999 be allowed to be brought on record and be allowed to be relied upon by producing copy of the same in the trial. After hearing the parties and especially the ld. Spl. Prosecutor, the ld. Presiding Judge/ Addl. Sessions Judge, rejected the said

application vide order under challenge.

4. It is submitted by ld. APP Mr. Pujari that the impugned order is bad-in-law and is nothing but preventing a party to lead legally admissible and relevant evidence during trial, though there is no scope of saying that such a permission, if granted, would result into any kind of prejudice to the defence side.

5. I have carefully gone through the contents of the application exh.126 and it is averred that the document on which the prosecution intends to place reliance and intends to place the same on record by proving it, is a part of muddamal articles collected by the Investigating officer during the course of investigation of Sessions Case No.85/1999. Muddamal article of sessions case No.85/1999 is a document that has been considered by the competent court while dealing with the trial of that particular sessions case i.e. Sessions Case No. 85/1999. The court is informed that trial of that case has reached to its logical end and some of the accused persons have been convicted,but respondent No.5 herein has been acquitted in the said case and the proceedings at present are pending by way of an appeal before the division Bench of this Court.

6. When this mater was listed for hearing, the ld. Counsel appearing for the respondents accused Mr. Saurin

Shah appearing for ld. Counsel Ms. GA Sondhi for the respondents accused, expressed his willingness to hear and decide the present Cri. Rev. Application finally and, therefore, this Revision Application is being heard and decided finally on merits at admission stage.

7. The grievance and nature of submissions made by ld. Counsel Mr. Saurin Shah for the respondents accused is that the prosecution intends to introduce one document and that too a copy, merely because the original one is a part of record of one another sessions case and practically at the fag end of trial and after examination of all important witnesses though copy of this very document has never been made a part of the chargesheet. None of the accused is provided with copy of the document which prosecution contemplates to produce and prove and prosecution can not be permitted to bring the document on record without providing it to the accused in advance and even before framing of the charge. A person namely Sultansha Kayamsha @ Sajimiya Sayeedfrom whose custody the document in question is allegedly recovered by the investigating agency is not cited as an accused or shown as absconding accused in column No.2 of the present chargesheet, but cited as a “prosecution witness” in the present case. This document is nothing but a money receipt issued by one Bhojani Travels (P) Ltd. Against

the amount/consideration paid to the said agency as an agent against the purchase of the Air Ticket on 04.02.1999.

8. When this Court found that there is a positive averment in the application exh.126 that zerox copy of the document concerned i.e. Article No.10 of Sessions Case No.85/1999 was given to the accused persons along with the chargesheet, this court decided to call ld. Spl. Prosecution because according to ld. Counsel Mr. Saurin Shah, this statement made in the application exh.126 is not true. Now, Mr.Dholakia, ld. Spl. Prosecutor appearing in the Court of Sessions is present before the Court and has explained the situation and has attempted to point out that a reference of bunch of four documents is impliedly mentioned i n the muddamal list produced in the Court and it is not a matter of dispute that copy of the muddamal pavti (receipt) is provided to the accused persons along with the papers of chargesheet. From the document at Sr.No.2 of muddamal receipt, according to ld. Spl. Prosecutor Shri Dholakia who has been permitted to address this Court, it is clear that the prosecution intends to rely upon the bunch of these documents i.e. (i) passport of accused Abdul Latif Mamad Sumara (No.A.6355548), (ii) Air Ticket purchased from Bhojani Travels, (iii) plastic envelope of Bhojani Travels and

the receipt of Rs.6400/ dated 04.02.1999. According to ld. Counsel Mr. Saurin Shah, there is no reference of receipt of 04.02.1999 given by Bhojani Travels though this very document was available before the commencement of trial with the prosecution and at least zerox copy of very document could have been obtained and produced if it was relevant in the present trial, otherwise, merely because a document is a part of one sessions case, it is a document foreign to the bunch of documents supplied to the accused in the present case and the same can not be permitted to be brought on record. The extreme submission of ld. Counsel Mr. Shah is that as this very document was not being there on record, the accused might have invited the charge considering it to be a material lacuna and the prosecution now intends to fill up the gap and that lacuna left by the investigating agency and in turn by the prosecuting agency by bringing a foreign document into the trial which is about to over and all material witnesses have been examined.

9. There can not be any dispute that a document in one case can not be a document in other case pending against the very accused persons of first sessions case. The Court is informed that practically the same set of accused are facing two different sessions trials and one of such trial has reached to its logical end and decision

in that sessions case is under scrutiny by the appellate Court. There is some force in the arguments of ld. Counsel Mr. Shah that merely because the respondents are some of them were aware about the existence of the document of the second trial which the prosecution now contemplates to produce on record in the present trial proceedings, it can not be said that the document was very well available to the accused and, therefore, the belated production of such document can not be permitted liberally and without entering into technicalities of law. As per settled legal position, the things which require to be done in a particular manner as provided under any Statute or statutory rules, then it must be done in the manner so prescribed.

10. It is true that certain deviations in mandatory or directory procedure is likely to result in to some kind of prejudice, but this Court is supposed to consider various aspects including the fact that the document which prosecution intends to bring on record is a part of muddamal of one another sessions case. How this document should be proved by the prosecution is not a question which requires to be gone into because it is the duty of the party to bring the document in accordance with the norms prescribed under the Indian Evidence Act. Once the document is even proved or exhibited, the evidentiary

value and other relevant aspects attached to that particular document is left to the court and so the arguments centering around these two aspects placed by ld. Counsel Mr. Saurin Shah appearing for the respondents accused need not be given any weightage. Muddamal pavti /receipt when clearly mentions that the prosecution intends to rely upon the bunch of documents and they are regarding travel by one of the accused by purchasing Air ticket from a particular travel agency, the statements of the witnesses have been recorded and they are part of the chargesheet. The fact of existence of very document i.e. receipt given by Bhojani Travels is very well there in the papers of investigation and undisputedly when that document was a part of the documents of other sessions case and was a muddamal article, providing a zerox copy of that very document in advance along with chargesheet would not be necessary if the prosecution intends to bring that document as a part of muddamal of the present case and ld. Spl. Prosecutor Mr. Dholakia as well as ld. APP Mr. Pujari has clarified that the prosecution intends to bring that document as a muddamal of the present sessions trial and if the document is required to be proved though the same is the part of muddamal, then the prosecution will also make an attempt to do so and normally in a sessions trial, a

muddamal article if it is to be shown to any witness, then before examining that witness, the same can be brought before the court if the same is also a muddamal of some other trial. So, who will prove this document viz Article 10 of muddamal of Sessions Case no.85/1999 or how it will be proved or prosecuting agency should be permitted to prove that document or not, are the questions which are independent to the entitlement to get it produced in the trial by prosecuting agency when the same is a part of muddamal article of another sessions case. A request to permit to produce article should not be thrown out because the same is made at a later stage of the trial merely because the muddamal article is a document. Accepted rule of procedure is that copies of muddamal articles in all the cases or detailed description thereof is not required to be provided and given to the accused and short description through muddamal pavti can be provided to the accused and the same is provided to the accused. So, it is true that the statement made by ld. Spl.Prosecutor in application exh.126 is not exactly correct, but it will be difficult for this Court to say that the statement is either misreading or false because there is indirect reference of the entire episode described by the prosecuting agency as to the travel of one of the accused or attempt to

travel by Air Ticket purchased from Bhojani Travels is very well there on record and the prosecution intends to rely upon all the relevant documents as emerged from the bunch of documents at Sr. No. 2 of muddamal Pavti produced in this very trial.

11. At this stage, I am inclined to accept the say of ld. APP Mr. Pujari that the observations made by the Apex Court in the case of **State of Tamil Nadu v/s Nalini & Others, AIR 1999 SC Weekly P. 1889,** have not been considered by the ld. Addl. Sessions Judge in correct perspective,where the Apex Court has observed in para-85 thus;-

> "85. The aforesaid implications of Section 12 vis-a-vis Section 15 of TADA have not been adverted to in Bilal Ahmed's case (1997 AIR SCW 3574: AIR 1997 SC 3483: 1997 Cri.LJ 4091) (supra). Hence, the observations therein that "while dealing with the offences of which the appellant was convicted there is no question of looking into the confessional statement attributed to him, much less relying on it, since he was acquitted of the offences under TADA" can not be followed by us. The correct position is that the confessional statement duly recorded under section 15 of TADA would continue to remain admissible as for the other offences under any other law which too were tried along with TADA offences, no matter that the accused was acquitted of offences under TADA in that trial."

Similarly, according to ld. APP Mr. Pujari, one more decision was also cited before the ld. Addl. Sessions Judge by ld. Spl.Prosecutor in the case of **State of Gujarat v/s Mohammed Atik & Ors., 1998 GLR page 2347**

which was also not considered, wherein it has been observed in paras 6 & 7 as under:-

> “6. When there is no statutory inhibition for using such confession on the premise that it was not recorded during the investigation of the particular offence which is under trial there is no need or reason for the Court to introduce a further fetter against the admissibility of the confessional statement. It often happens that a confessor would disclose very many acts and events including different facets of his involvement in the preparation, attempt and commission of crimes including the acts of his co-participators therein. But to expel every other incriminating disclosures than those under investigation of a particular crime from the ambit of admissibility is not mandated by any provision of law.
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> 7. We have, therefore, absolutely no doubt that a confession, if usable under Sec.15 of the TADA, would not become unusable merely because the case is different. If the confession covers that different crime, it would be a relevant item of evidence in the case in which that crime is under trial and it would then become admissible in the case.”

12. It appears from the plain reading of the order under challenge that the court has mainly rejected the application exh.126 on the ground that the accused are undertrial since about 5 years and attempts are being made by the prosecuting agency to protract the trial by filing such or similar application. The court is informed that prior to submission of application exh.126, one application exh.123 was also submitted on 29.04.2005 and the endorsement by the ld. Counsel appearing for the respondents accused reveal that the objection raised is

technical and is against the relevancy of the document. Endorsement shows “objected, no relevancy with the present case.” This Court is not attracted with the arguments advanced by ld. Counsel Mr. Shah that the accused shall have no opportunity to explain the contingency or to cross-examine the witnesses who are already examined after production of document. For this purpose, by convincing the trial Court, respondents accused may recall the witness/witnesses. Who is the best witness to prove document article 10 of muddamal contemplated to be produced by moving application exh.126, is an independent question and it requires to be considered by the trial Judge when prosecution attempts to tender that document in evidence. It is very likely that the prosecution may satisfy itself with the production of the document so that it may not be argued that there is no satisfactory proof as to even existence of such document. It is the privilege of the Court to have a look at the muddamal article. Merely because it was recovered, even as per the say of the prosecution, from a person who is not an accused in present case, would not make the prosecuting agency disentitle in getting it produced from the accused or from the body of the person accused or from the place or vessel, and can be legitimately proved by the person who has recovered

that document and what weightage should be attached to his version as to the recovery made by him, is a matter of appreciation of evidence and this court would not like to comment on it in advance because this point shall have to be adjudicated by the trial Court. It is possible in such case to issue summons to get the document produced if such document is in the custody of a third party or by calling upon the witness of the Court who has conducted the other case, and document or muddamal if relevant in the second case, can be brought on recorded provided the accused are made aware about the allegations made by the prosecution and this Court can not ignore the contents of entire bunch of papers of investigation and especially the challan filed by the police and charge framed by the trial Court. In the charge, it is specifically mentioned that the concerned document is recovered from the absconding accused Sultansha Kayamsha @ Sajimiya Saheb Saiyed, Re: New Karanchi of Pakistan during his personal search and it also refers Air Booking Receipt of Rs.6400/ dated 04.02.1999. So, when the accused are aware about the nature of allegations against them and of charges which they are facing, it would be difficult for this Court to say that apprehension that the accused are likely to be prejudiced by belated production of the document, is not found sustainable. It is relevant to

note that the document in question is seized from one of the accused and all the accused are facing charge of criminal conspiracy under section 120-B of IPC. So, the apprehension expressed is not found genuine.

13. In response to the query raised by the Court, ld. Counsel Mr. Saurin Shah has fairly accepted that the point of primary evidence and secondary evidence may not be gone into by this Court at this stage and respondents accused would not object the production even if zerox copy or compared zerox copy by the competent Court or court machinery is brought on record as muddamal article especially when the same article is also relevant in one another sessions trial and now required to be perused and examined by the appellate Court. How, this document should be brought, whether original should be kept with the trial Court or whether zerox true copy would serve the purpose, are the questions which require to be dealt with by the ld. Trial Judge on the submissions that may be made before the Court, but I am inclined to accept the grievance of the State that the order of rejection of application exh.126 is bad and the same requires to be quashed and set aside. The ld. Trial Judge ought to have allowed the application exh.126 and permitted the prosecution to produce receipt issued by Bhojani Travels

dated 04.02.1999 which is a part of muddamal article No.10 in Sessions Case No.85/1999 pending practically against same set of accused.

14. For the reasons aforesaid, Revision Application is allowed. The impugned order dated 03.06.2005 passed by the ld. Addl. Sessions Judge, Kutch at Bhuj in Sessions Case No. 56/2002 rejecting application exh.126 is hereby quashed and set aside. Application exh.126 is allowed and document as prayed for is permitted to be brought on record as muddamal in the proceedings of Sessions Case No.56/2002 and everything is left to the prosecution as to how and in what manner the prosecution agency intends to rely on the said document and what recourse the agency adopts in getting the said document proved.

(C.K. BUCH, J)

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